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In the

Supreme Court of the United States

No. 1169

SUBURBAN TILE CENTER, INC., a corporation, and UNITED CONSTRUCTION AND TRADES UNION, LOCAL NO. 102,

Petitioners, Appellants Below,

vs.

BUILDING CONTRACTORS ASSOCIATION OF ROCKFORD, INC., a corporation, MERLE F. DRAGER, Individually and as Secretary of the Building Contractors Association of Rockford, Inc., etal,

Respondents, Appellees Below.

BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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BRIEF IN REPLY TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To The Honorable The Chief Justice And The Associate Justices Of The Supreme Court Of The United States:

Respondents, Building Contractors Association of Rockford, Inc. and Merle F. Drager, Individually and as Secretary of the Building Contractors Association of Rockford, Inc. respectfully pray that the petition of Suburban Tile Center, Inc. and United Construction and Trades Union, Local No. 102 for the issuance of a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on November 30, 1965 be denied.

OPINIONS BELOW.

The opinions below are correctly stated in the petition for Writ of Certiorari and will not be reiterated here.

JURISDICTION.

The statement of jurisdiction in the petition for Writ of Certiorari correctly sets forth the applicable statutory provision under which the petitioners seek to bring the instant case before this Honorable Court.

QUESTION PRESENTED FOR REVIEW.

The sole question presented to your Honors at this time is whether the judgment of the United States Court of Appeals for the Seventh Circuit in the instant case presents such a novel or important question of law as to justify review of that decision by this Court. The Petitioners have excessively broadened the statement of the question presented by interpolating into the record matters which were not properly before the United States District Court for the Northern District of Illinois or the United States Court of Appeals for the Seventh Circuit.

If this Court grants the petition for Writ of Certiorari the only question which it can review is whether on the basis of the factual matter before it the United States District Court was justified in dismissing the complaint of the petitioners herein for failure to state a claim upon which relief could be granted and whether the United States Court of Appeals for the Seventh Circuit was justified in affirming that decision, again based solely on the matters before that Court.

STATUTORY LAW INVOLVED.

The pertinent portions of the statutes applicable to the instant case have been correctly set forth in the petition and need not be reiterated at this point.

BASIS FOR FEDERAL JURISDICTION.

The statement of the basis on which the petitioners sought the jurisdiction of the Federal Court in this matter correctly states forth the applicable statutory provisions and is not contested by your respondents.

STATEMENT OF THE CASE.

This brief is presented by the Building Contractors Association of Rockford, Inc., a corporation and Merle F. Drager, Individually and as Secretary of the Building Contractors Association of Rockford, Inc.

The statement of the case as contained in the Petition For Writ of Certiorari is substantially correct. Suffice it to say at this time that the only matters before this Court or any other Court concerning the instant case are the pleadings which consist of nothing more than a complaint as amended and motions by the various defendants to dismiss the amended complaint. Any matter other than that contained in those pleadings is not now before this Court and should not be considered by it.

In order to put the matter in controversy more in focus for this Honorable Court we have included in our argument a brief statement of each paragraph of the complaint which applies to the respondents, Building Contractors Association of Rockford, Inc. and Merle F. Drager. Reiteration of those provisions at this point would be unnecessary duplication.

ARGUMENT IN SUPPORT OF REASONS FOR DENYING THE WRIT.

The instant case originated in the United States District Court for the Northern District of Illinois, Eastern Division. On motion of the defendant, respondents herein, the complaint of the plaintiff, petitioners herein, was dismissed by the Honorable Richard B. Austin, Trial Judge, who allowed the plaintiffs leave to amend the complaint. The respondents moved to dismiss the complaint as amended. Pursuant to those motions the trial judge dismissed the complaint for failure to state a claim upon which relief could be granted. The only matters before Judge Austin were the pleadings of the parties which consisted of the complaint as amended and motions to dismiss by the various defendants.

Thereafter the matter was appealed to the United States Court of Appeals for the Seventh Circuit which, in a decision set out in the Appendix to the Petition for Writ of Certiorari, affirmed the judgment of the District Court. The opinion affirming that decision was also based solely on the pleadings of the parties—the complaint as amended and motions by the various defendants to dismiss the amended complaint.

Thereafter the petitioners presented their Petition For Writ of Certiorari asking this Court to review the decision of the United States Court of Appeals for the Seventh Circuit.

In attempting to seek review in this Court the Petitioners must confine themselves solely to the matters which were before the trial and appeal courts. Those

matters consist once again of nothing more than the pleadings—a complaint as amended and motions by the various defendants to dismiss the amended complaint.

The principal question which the petitioners attempted to litigate was the application of the language of Section 8(e) of the National Labor Relations Act (29 U.S.C. 158(e)) to a certain construction industry subcontracting agreement entered into by several of the defendants.

Section 8(e) provides in pertinent part as follows:

> "It shall be an unfair labor practice for any labor organization and any employer to enter into any contract, agreement, express or implied, whereby such employer ceases or refrains or agrees to cease or refrain from handling, using, selling, transporting or otherwise dealing in any of the products of any other employer, or to cease doing business with any other person, and any contract or agreement entered into heretofore or hereafter containing such an agreement shall be to such extent unenforcible and void: *Provided, That nothing in this subsection shall apply to an agreement between a labor organization and an employer in the construction industry relating to the contracting or subcontracting of work to be done at the site of the construction, alteration, painting, or repair of a building, structure, or other work* * * *"
> (Emphasis added)

The petitioners contended in their complaint and before the United States Court of Appeals for the Seventh Circuit and once again argue in this Court that the agreement entered into between the respondents, Building Contractors Association of Rockford, Inc. and the Rockford Building and Construction Trades Council, A.F.L.-C.I.O. and to which respondent Suarez Brothers Construction Co. Inc. later became a party, exceeds the permissible

scope of the construction industry's subcontracting proviso of Section 8(e) of the National Labor Relations Act.

Recognizing once again that the only matters of this controversy before any Court are the amended complaint and the motions to dismiss, a brief summary of the complaint will put in focus for this Court the facts of the case upon which your Honors must decide whether or not to review the judgment of the United States Court of Appeals for the Seventh Circuit.

Since Count II does not purport to apply to respondents Building Contractors Association of Rockford, Inc. and Merle F. Drager no discussion of that Count is necessary here.

Except as to a description of the plaintiffs, the first twenty (20) paragraphs of the complaint as amended are identical in Counts I and III. The first thirteen (13) paragraphs contain allegations of jurisdiction and venue, descriptions of the parties, allegations regarding trade and commerce and allegations relative to certain undertakings of Suburban Tile Center, Inc.

Paragraph 14 alleges that the defendants "and each of them entered into a combination to suppress competition among trade, craft and/or construction contractors and/or subcontractors, and/or among trade and/or craft and/or construction unions, resulting in an unreasonable restrain upon trade and in violation of Sections 1 and 2 of the Sherman Act * * *"

Paragraph 15 alleges that the defendants or two or more of them combined, conspired and confederated to maintain in existence certain agreements, understandings, conspiracies and combinations which are set out in the complaint.

Paragraph 16 deals with a purported agreement between the Rockford Trades Council and Suarez Brothers Construction Company, Inc.

Paragraph 17 alleges that on or about June 21, 1963, Suarez Brothers Construction Company, Inc. became a party to a certain restricted agreement previously existing between the Contractors Association and the Rockford Trades Council.

Paragraph 18 alleges restraint, burden and monopolization of commerce in the construction field and allied industries because of the combinations and conspiracies.

Paragraphs 19 through 21 of Count I allege that employees of Suburban Tile Center, Inc. at the construction job were union members; that plaintiff was informed by agents of the Rockford Building and Construction Trades Council, that since the employees were not members of a local union affiliated with the Rockford Trades Council, certain of them would not be allowed to work on the job; and that from time to time plaintiff was threatened with work stoppages, picketing, boycotts, and a federal suit by the Rockford Trades Council since plaintiff did not have contract with the Rockford Trades Council.

Paragraphs 22 and 23 of Count I refer to an injunction suit instituted in the Circuit Court of Winnebago County, Illinois, by the Rockford Building and Construction Trades Council, et al., against Suarez Brothers Construction Company, Inc., and the decree entered therein restraining Suarez from hiring or subletting any work to any "person, firm, corporation, or association not having a collective bargaining agreement with the Rockford Building and Construction Trades Council".

Paragraphs 24, 25 and 26 of Count I allege injury to the plaintiff, Suburban Tile Center, Inc., the public, and that Suburban Tile Center, Inc. is entitled to treble damages.

Paragraph 21 of Count III alleges that plaintiff, United Construction and Trades Union, Local No. 102, was informed by the Rockford Trades Council that certain of its members would not be permitted to render services in Rockford.

Paragraph 22 of Count III is identical with paragraph 23 of Count I.

Paragraph 23 of Count III alleges that the combinations, conspiracies, agreements and other methods to accomplish the monopolies permanently damaged plaintiff, United Construction and Trades Council, Local No. 102 and its members.

Paragraph 24 of Count III alleges that the combinations, conspiracies and confederations jeopardize the plaintiff's rights under a collective bargaining agreement with Suburban Tile Center, Inc.

Paragraphs 25 and 26 of Count III allege injury to the plaintiff and further allege that the matters as stated in the complaint had been brought to the attention of the National Labor Relations Board, which affected a settlement agreement, but which agreement in no way limited or precluded the remedies of the plaintiff in this action.

It is axiomatic that the validity of a complaint depends upon the allegations thereof containing sufficient factual matter to advise the defendants of the claim against them. And a complaint which does not allege facts sufficient to give the defendants full notice of the claim against

them or which alleges mere general conclusions does not state a claim upon which relief can be granted. *Sutton, et al.* v. *Easten Viavi Co.*, 138 F. 2d 959 (1943, C.A. 7); *Shotkin* v. *General Electric Co., et al.*, 171 F. 2d 236 (1948, C.A. 10).

It should be remembered by this Court that in order to keep this case out of the purview of Section 8(e) the petitioners must contend in essence that the agreement here in question between the Building Contractors Association of Rockford, Inc., and Rockford Building and Construction Trades Council, A.F.L.-C.I.O. and to which Suarez Brothers Construction Company, Inc. became a party prohibited the subcontracting of construction work to any subcontractor not a party to the agreement regardless of the place within Winnebago County where the construction, alteration, painting or repair of a building, structure or other work was to be performed be it at a construction site, shop and/or any parts betwixt and between (Petition For Writ Of Certiorari page 13). The petitioners also contend that the agreement in question creates a monopoly in favor of the members of the Building Contractors Association of Rockford, Inc. and the members of the Rockford Building and Construction Trades Council, A.F.L.-C.I.O. However, in support of these far reaching allegations the petitioners in their complaint fail to allege any factual matter on which this Court or any other Court might base a conclusion that the agreement in question extends beyond particular construction sites and therefor contravenes the explicit language of Section 8(e) of the National Labor Relations Act or that the agreement creates an absolute monopoly contrary to Sections 1 and 2 of the Clayton Act and con-

trary to the rule of this Court in *Allen Bradley* v. *Local Union No. 3*, 325 U.S. 797.

It should be readily apparent to this Court that any and all factual allegations in the complaint relate specifically to the particular construction site, commonly known as the Presidential Courts Project, on which petitioners were engaged in Winnebago County. Not one factual element is pleaded by the petitioners which would show that at any time has the agreement in question been extended beyond the scope allowed by the language of Section 8(e) of the National Labor Relations Act and not one factual element has been pleaded which would show that at any time has the agreement in question created or tended to create a monopoly in favor of the Building Contractors Association of Rockford, Inc. and the Rockford Building and Construction Trades Council A.F.L.-C.I.O.

Your respondents submit that these matters were before the United States Court of Appeals for the Seventh Circuit and were considered by that Court when it rendered its decision to affirm the judgment of the United States District Court for the Northern District of Illinois, Eastern Division.

Simply stated the decision of the United States Court of Appeals for the Seventh Circuit holds nothing more than that on the record before it there is no basis to conclude that the agreement in question exceeded the permissible scope of the language in Section 8(e) of the National Labor Relations Act and that on the basis of the record before it there is a clear indication that the agreement in question did not tend to create a monopoly in favor of the Building Contractors Association of Rockford, Inc. and Rockford Building and Construction Trades Council, A.F.L.-C.I.O.

The Court first considered the allegations in the pleading and concluded that they were confined to a complaint about the effect of the agreement solely on the work of the petitioners at the Presidential Courts Project. The Court then cited a number of recent cases in which contracts similar to the one here in question have been upheld. *Los Angeles Building and Construction Trades Council (Fowler-Kenworthy Electric Co. et al.)* (1965), 151 NLRB No. 83; 58 LRRM 1490; *Orange Belt District Council of Painters No. 48* v. *NLRB,* D.C. Cir., 1964, 328 F. 2d 534, 537; *Building and Construction Trades Council of San Bernadino and Riverside County* v. *NLRB,* D.C. Cir., 1964, 328 F. 2d 540; *Essex County and Vicinity District Council of Carpenters, etc.* v. *NLRB,* 3 Cir., 1964, 332 F. 2d 636, 641; *Construction, Production & Maintenance Laborers Union, Local 383* v. *NLRB,* 9 Cir., 1963, 323 F. 2d 422, 425.

Even though not necessary for its decision the Court noted that in the *Los Angeles Building Construction Trades Council* case the NLRB approved an agreement similar to the one here in question even though it was not specifically limited to a particular construction site.

The petitioners place a substantial amount of reliance on the case of *Allen Bradley* v. *Local Union No. 3,* 225 U.S. 797, in contending that the agreement in question constituted a monopoly in favor of the Building Contractors Association of Rockford, Inc. and the Rockford Building and Construction Trades Council, A.F.L.-C.I.O. However, the United States Court of Appeals for the Seventh Circuit recognized from the pleadings that the agreements all provided that any contractor or subcontractor may enter into a similar agreement. The Court then, and your respondents contend, rightly so, held that

this precluded the establishment of an effective monopoly. In the *Allen Bradley* case a complete monopoly was achieved which the Court recognized is not the case here.

This then negates the petitioners' misplaced reliance on that case as authority for its conclusion that the agreement here in question tends to create a monopoly.

In short your respondents contend that as before the United States District Court for the Northern District of Illinois, Eastern Division and before the United States Court of Appeals for the Seventh Circuit no other "facts" are before this Court than those contained in the pleadings of this case. Since the only factual allegations contained in those pleadings relate specifically to the Presidential Court Project construction site, the arguments of the petitioners as to the "extra territorial" effect of the agreement in question are immaterial and irrelevant at this time. Therefore, considering only the pleadings in this case, the question of the application of the construction industry subcontracting proviso of Section 8(e) of the National Labor Relations Act to the agreement here in question is not a question of such substantial importance that it requires consideration by this Honorable Court. Furthermore, again considering only the pleadings of this case, it is evident that the agreement here in question, by permitting any contractor or subcontractor to become a party thereto, negates any possibility of a monopoly and therefore clearly presents no serious question for the determination of this Court.

CONCLUSION.

Your respondents respectively suggest that the decision of the United States Court of Appeals for the Seventh Circuit very simply disposed of the questions presented by this case feeling that no major undecided point of law was involved. The decision of that Court should be allowed to stand unreviewed by this Court.

Respectfully submitted,

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